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Assigned Agency QUESTIONS & ANSWERS-PART 2

The Duty to Maintain Confidential Client Information

*The following questions and answers have been developed to assist licensees in complying with the provisions of the new Assigned Agency law, and, specifically, **the duty to maintain confidential client information**. These answers are intended to address general situations only and are not intended as legal opinions. Licensees should consult their attorneys for legal advice concerning the new law's effect on their brokerage practices.*

What is "Confidential Client Information"?

Question: What is "confidential client information"?

Answer: Any information about the client, which, if disclosed, would be detrimental to the client. This typically means information about the client's bargaining position.

Example: A client-buyer tells his sales agent he has a tight moving schedule and needs to buy something fast. This is confidential client information because it concerns the client's bargaining position.

However, client information is **not** "confidential" if:

- It is a matter of public record; **or**
- It has been generally disseminated in the marketplace (including "sold" prices); **or**
- The client has disclosed it to third parties; **or**
- The client has authorized it to be disclosed to third parties.

Example: A client-seller has already purchased his new home. He is openly telling his new neighbors he is having difficulty carrying two mortgages and that he expects to accept an offer lower than listing price. This is **not** confidential information because the client has disclosed it to third parties (his neighbors).

Question: Can a client's personal or business motivation to buy or sell, or the client's financial condition be considered "confidential client information"?

Answer: Yes. Such information can reveal the client's bargaining position. This is why licensees should take great care not to discuss their client's personal or business affairs.

Question: Can other offers made by a buyer-client, or other accepted offers on the property (failed transactions) by the client-seller, be considered "confidential client information"?

Answer: Yes. This information, if disclosed, reveals the price that the client is willing to pay, or accept, for the property. Because disclosure could harm the client's bargaining position, the brokerage and its licensees must maintain the confidentiality of this information.

Question: Since "pending transaction" files and "failed transaction" files contain client bargaining information, must the brokerage ensure that this information is not used by other agents in the firm who may be assigned to act on behalf of the other party in the transaction?

Answer: Yes. The manner and method of accomplishing this is up to the brokerage.

Question: Does a licensee acting as a non-agent owe his or her customer a duty of confidentiality?

Answer: No. The duty of confidentiality is specific to the agent-client relationship.

Assigned Agency and the Duty of Confidentiality.

Question: I have reviewed my brokerage's files containing confidential information concerning a buyer client. May I subsequently be assigned to represent the seller in an in-house transaction?

Answer: Probably not. Depending upon the nature of the information, and the office policy of the brokerage, you may be unable to take the assignment. If you are assigned to represent the seller, you are prohibited from disclosing or otherwise using the confidential information.

Question: I attend a social function (not involving my brokerage or its other sales associates), where everyone, including the seller, is talking about the seller's new job out-of-state and that she is eager for a quick sale. May I subsequently be assigned to represent the buyer in an in-house transaction?

Answer: Yes. This information has been disclosed by the seller to third parties (the people at the social function), and therefore is **not** "confidential client information" that you and your brokerage are required to keep confidential.

Question: I read in the newspaper that the seller is facing a large lawsuit and that he is scrambling for cash to settle. May I subsequently be assigned to represent the buyer in the in-house transaction?

Answer: Yes. This is not confidential client information because it is a matter of public record. Neither you, nor your brokerage, has a duty to keep the information confidential.

Question: I am now an assigned agent. May I discuss my client's confidential information with my broker?

Answer: Yes. Your broker has the duty to supervise you in the transaction and to see that you fulfill your duties to your assigned client. Your discussions with the broker should be candid. The broker remains a limited dual agent to both parties, and cannot use or disclose your client's confidential information to any other client.

Question: I am now an assigned agent acting on behalf of the seller. Without violating any of the company's written office policies, I obtain confidential client information about the buyer, who is being represented by a different agent in the firm. What is my duty regarding this information?

Answer: If disclosure will promote the interests of your seller-client, you have a duty to disclose the information to the seller-client.

Question: What should I do if my brokerage or its licensees (other than the agent assigned to represent the other client) causes confidential information about **my** client to be disclosed to the **other** client in an in-house transaction?

Answer: If you think this has happened, you should inform your broker immediately. If the broker (who is a limited dual agent and owes the same duty to both clients) determines that a disclosure has occurred, he must promptly provide written notice of the disclosure to the affected client.

Conflicts of Interest

Question: If I have a personal or financial interest in the transaction that is adverse to one of the parties in the transaction, may I act as an assigned agent for that party?

Answer: Probably not. An assigned agent has a statutory duty to promote the interest of the client to whom he or she is assigned, over the interests of the other. Your conflict of interest compromises this ability legally, if not actually, and makes it unlikely that you can fulfill this duty. If you are assigned to represent a client with whom you have a conflict of interest, you **must** fully disclose that conflict and obtain that client's consent to the representation.

Question: In an in-house transaction, both parties have consented to Assigned Agency. However, the seller is engaged to my daughter. May I be assigned to represent the buyer?

Answer: Probably not. There is a conflict of interest that will likely make it impossible - at least in appearance - for you to promote the interests of your buyer/client **over** those of your future son-in-law's. If you believe you can set your personal interests aside, you still should discuss the conflict with your broker. Before taking the assignment, you **must** disclose the conflict to all clients in the transaction.